NO. 48909-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL LEE COOPER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 14-1-05273-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with deadly weapon enhanced assault in the second degree (Ct.I), third degree assault (Ct.II), malicious mischief in the second degree (Ct.III) and obstructing an officer (Ct.IV). CP 9-11. Pretrial motions were heard. 2RP 101-02. Defendant requested Officer Moses be precluded from using the statutorily defined term "deadly weapon" when referring to the metal cane used to break the victim's nose. *Id.* The court agreed it would be inappropriate to call the cane a "deadly" weapon as that

[1] ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015).

term would be defined in the instructions. *Id.* Defendant did not ask that Moses be further prohibited from using the word "weapon" while testifying that defendant was directed to "drop the weapon" when detained. *Id.* For the first time on appeal, it is claimed that testimony expressed an opinion about defendant's guilt. 2RP 141-42. At trial it was subject to a general objection that vaguely referenced motions in limine, but only after the word "weapon" had been used without objection. 2RP 137, 141-42.

Four exhibits were admitted, including video from the restaurant where the primary incident occurred, a 911 call about the incident as well as the metal cane defendant used to assault the victim. CP 431-32;[2] 3RP 220. Testimony was adduced from three restaurant employees, the victim, Officer Moses and a doctor who treated the victim's injury. CP 431. They collectively established defendant provoked conflict before being removed from a restaurant only to return; whereupon, he used a metal cane to break the victim's nose through a gap in the door braced to prevent defendant's reentry.[3] Self-defense instructions were requested. *Id.*; 3RP 266-67; 5RP 349; CP 102-05. The court withheld them because they were not supported by evidence that only proved a retaliatory attack. 5RP 349-50.

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[2] CP above 430 reflect an estimate of how supplemental designations will be numbered.
[3] 2RP 130-37, 141-43, 152-53; 3RP 199, 201-08; 4RP 289, 311-16, 324, 331; Ex.2, 4-5, 11.

Properly instructed jurors convicted defendant of second degree assault, third degree assault and criminal mischief. CP 152, 154-55, 157. Despite the purported prejudice attending Moses' use of the word "weapon," neither the "deadly weapon" enhancement nor the obstruction charge were found. CP 156-58. Defendant had 52 prior convictions; the felony portion of which aggregated with current offenses to give him an offender score of 11. CP 408-12. He claimed to be remorseful for pain he caused the victim as well as for the distress he caused everyone else. 10RP 500. Discretionary LFOs were waived after his ability to pay was considered. 10RP 504. Mandatory LFOs were imposed without objection after he averred that his mental health issues would not interfere with his attainment of two college degrees. 10RP 500-01. A timely notice of appeal was filed. CP 423.

2. Facts

Brent Nuttall went to the Jack in the Box restaurant in Tacoma on the evening of December 30, 2014. 3RP 194-97. Nuttall is homeless. *Id.* So he sat with other homeless people as he ate a meal. *Id.* Defendant was also in the restaurant. 3RP 198. He started yelling about someone taking a bag, but he was never seen with one nor was one found by the employees who searched the restaurant. 3RP 199; 4RP 311, 314-15. Defendant grew visibly agitated. 3RP 201. He began pacing about. *Id.* There was a collapsible metal walking cane in his hand. *Id.*; Ex. 4. He was yelling profanities at everyone.

4RP 311-12. An employee repeatedly told him to leave. *Id.* But defendant would not; instead, he continued wandering shouting profanities. *Id.*

Nuttall grew nervous as he watched defendant circle with an angry pace while "[b]randishing" his cane as a "focal point" of the demands. 3RP 199-204. He suggested the cane could be used as a weapon, and screamed. *Id.* Nuttall's fear intensified when defendant stared "strongly" in Nuttall's direction. *Id.* Defendant fumbled to position his cane for a strike. 3RP 201. His yelling devolved into "growling." 3RP 203. The young, likely teenage, employees began to "panic." *Id.* They just started "running back and forth." 3RP 204. "[O]ne may have shrieked … [in] fear." *Id.* At one point defendant moved closer to a door. 4RP 311. Nuttall seized the opportunity to push him outside. 3RP 204, 206-07; 4RP 301, 312. It "seemed like the safest thing to do." *Id.* Nuttall was concerned someone was about to be attacked. 3RP 205.

Once defendant was outside, Nuttall tried to close the door. 4RP 312. Several customers tried to lock the other doors. *Id.* Nuttall returned to his seat to calm down. 3RP 206. Defendant continued yelling outside. 3RP 207; 4RP 323. He swung his "ski poke" like cane at people in the parking lot. 4RP 323. Then "violent[ly]" turned his attention back to the restaurant. 4RP 323. Nuttall saw him ready the cane, "twirling it [] as if to prepare." 3RP 207. Afraid, employees yelled for the doors to be locked. 4RP 312, 331. One employee cried; another called 911. *Id.*; Ex.11. At first Nuttall just

watched from his seat. 3RP 207. But then decided he needed to intervene, but "as if to talk." 3RP 208. He walked toward the inside of the door as defendant aggressively approached it from outside. 3RP 207; 4RP 323.

Nuttall tried to lock defendant out. 3RP 207; 4RP 312, 316. But the door was ajar, so it could not be secured in time. *Id.* A struggle for control of it ensued. *Id.* Nuttall braced the door. *Id.* Defendant tried to force it open. *Id.* Unable to do so, he thrust his cane through a gap in the door, then swung the cane down hard upon Nuttall's face. 3RP 208; 4RP 301, 305-07, 326-27. The blow fractured Nuttall's nose in several places. *Id.*; 4RP 289. He gasped, "Oh, God," believing he may "have been mortally wounded" or seriously injured; he had never been hit so hard with a stick. 3RP 208; 4RP 305. There was blood everywhere. 4RP 301. He nevertheless managed to lock the door. 3RP 208; 4RP 314. He retreated to a seat where people tried to help him. 3RP 208-09; 4RP 306. Defendant's rampage continued. 3RP 219; 4RP 302, 316, 324. He smashed one the restaurant's main glass doors. 3RP 209; 4RP 302. With that final destructive act, he fled. *Id.*

Officer Moses was dispatched to the scene. 2RP 131-32, 137. The incident was reported as an assault in progress being committed by a male swinging a metal cane around breaking windows. 2RP 131-32, 137. Moses saw defendant one block from the restaurant. 2RP 133. Defendant was walking, swinging the metal cane over his head. *Id.*; Ex.5 (pic.#26). Moses

ordered him to stop. 2RP 134. Defendant refused. 2RP 136. He looked at Moses, started yelling, then picked up his pace. *Id.* Moses pulled the patrol car into defendant's path. *Id.* Aware defendant reportedly used the cane as "a weapon" at the restaurant, Moses exited his car and "ordered [defendant] to drop the weapon[.]" 2RP 137, 140-41. Defendant complied. *Id.*

But then he reached into his pockets. 2RP 138. Moses refrained from transitioning to his pistol despite fearing defendant might grab a second weapon. 2RP 138-39. Moses ordered defendant to the ground. 2RP 139. Moses labored to handcuff him. 2RP 143-47. Defendant tried to roll away. *Id.* Moses alerted dispatch to the fight, but eventually prevailed. *Id.* He gave defendant a *Miranda* warning; to which, defendant responded: "Fuck you." 2RP 150-51. He was transported to jail by another officer. *Id.*

Moses proceeded to the restaurant. *Id.* He noted Nuttall's nose bent to one side. 2RP 152. Blood ran from it into a pool forming on the floor. *Id.* Moses saw the doors defendant "completely smashed out." 2RP 153; Ex.5 (pic.#27-30). Nuttall was transported to St. Joseph's Hospital. 2RP 153-55; Ex.5 (pic.#31-34,37). A CAT scan revealed a comminuted (several point) fracture of his nose as well as a displaced nasal bone with disjointed bone fragments. 4RP 288-89.

C. ARGUMENT.

1. SELF-DENSE INSTRUCTIONS WERE RIGHTLY WITHHELD SINCE THE EVIDENCE PROVED DEFENDANT PROVOKED HIS EXPULSION FROM A RESTAURANT HE RETURNED TO IN A RETALIATORY ACT THAT ENDED WITH HIM STRIKING HIS VICTIM THROUGH A GAP IN THE DOOR DEFENSIVELY BRACED TO PROTECT PEOPLE FROM DEFENDANT.

The right of self-defense does not imply a right of attack or permit action done in retaliation. ***State v. Janes***, 121 Wn.2d 220, 240, 850 P.2d 495 (1993); ***State v. Walker***, 40 Wn.App. 658, 662, 700 P.2d 1168 (1985). Self-defense instructions should only be given if there is evidence to support the theory. ***State v. Walden,*** 131 Wn.2d 469, 473, 932 P.2d 1237, 1239 (1997). There are three elements to a self-defense claim, *i.e.*, the defendant feared imminent danger of bodily harm, the belief was reasonable and the force used was no more than necessary. ***State v. Werner***, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). If any element lacks support, self-defense instructions are not given. ***State v. Walker***, 136 Wn.2d 767, 773, 966 P.2d 883 (1998).

Refusal to give them is reviewed for an abuse of discretion when based on a factual dispute. ***State v. Brightman***, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). Review is *de novo* when they are refused as a matter of law. *Id.* Regardless of the standard applied, the decision can be affirmed on any basis. ***State v. Norlin***, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

The trial court voiced concerns about instructing on self-defense:

> [W]hat I've heard so far indicate[s] the apparent threats, the incident involving Mr. Nuttall primarily ended until such time the defendant allegedly attempted to come back into the restaurant with his device in hand, and that's when the blow occurred to Mr. Nuttall. Obviously, there is an issue of who is the aggressor and whether or not you're entitled to a self-defense instruction, if you put yourself in that position.
>
> Based upon what I have, you can take a look at it. I'm not saying you can't propose it. I'm certainly open to argument on it and any additional authority that you want to submit[.]

3RP 266-67. Defendant proposed several self-defense instructions. CP 98-112; 4RP 280; 5RP 346-49. But the court could not find support for them:

> I just don't see it in terms of the facts. If Mr. Nuttall had pursued [defendant] through the door out into the parking lot after he shoved him out the first time, then the strike occurred, I think that would be a legitimate claim of self-defense, but Mr. Nuttall was behind a closed door. There is no indication he was doing anything other than to try to keep [defendant] from reentering and potentially causing additional injury with his device that he was using, after it went from being a shove to have him leave and stop being a disruption in the restaurant to then this battle over the door and the lashing out with the cane.
>
> I think under the facts that are presented, even viewing them with the eye towards potentially giving a self-defense instruction, I was waiting for something that would tie it together, so that I could give it. I just don't see it here. I think the defense's argument probably is more properly that there was not an intentional assault with this cane that he was swinging at the door, and Mr. Nuttall struck his head either in the doorway or was injured in that process, but I don't see it as a self-defense case.

5RP 350. That ruling is sound for several reasons.

Defendant was the first aggressor of the entire incident. It was his violent behavior that provoked Nuttall's decision to protect everyone in the restaurant by pushing defendant out of the door. If defendant could have lawfully resisted with reasonable force, he lost the right once he was safely outside since Nuttall retreated to his chair inside. Defendant reinitiated the confrontation by leaving the safety of the parking lot to aggressively return. Nuttall again tried to protect the people inside by bracing the door to prevent defendant's reentry. And it was while defendant was standing safely on the other side that he struck Nuttall with the cane. The blow exerted far more force than necessary even if one accepted it was delivered in self-defense. So reasons to withhold self-defense arise at every stage of their encounter.

a. Self-defense instructions were rightly withheld as defendant was the first aggressor who provoked his removal from the restaurant.

Self-defense is unavailable to first aggressors. ***Janes***, 121 Wn.2d at 240; ***State v. Currie***, 74 Wn.2d 197, 199, 443 P.2d 808 (1968); ***State v. Callahan***, 87 Wn.App. 925, 930, 943 P.2d 676 (1997); ***Walker***, 40 Wn.App. at 662; RCW 9A.16.020. "[A] defendant whose aggression provokes the contact eliminates his right to self-defense." ***State v. Douglas***, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). One cannot create the need to use force by setting events that culminate in a fight into motion. ***Walker***, 40 Wn.App. at

663. This doctrine has long precluded people from misusing self-defense claims to perpetrate acts of offensive aggression. *Id.*; ***Currie***, 74 Wn.2d at 199 (citing ***State v. McConaghy***, 84 Wash. 168, 170, 146 P. 396 (1915)).

Defendant's escalating belligerence in the restaurant vested Nuttall with a right to defend himself and others from defendant. *See* ***State v. Penn***, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). Since good Samaritans like Nuttall can take action to protect those around from imminent danger whenever it is reasonably perceived. *See* ***State v. Jarvis***, 160 Wn.App. 111, 122, 246 P.3d 1280 (2011). Such people are often called heroes—a title befitting Nuttall in this case.[4] Defendant's proven ability to so rapidly fragment the bones of a person's nose with his cane showcased the danger neutralized by Nuttall's brave decision to act when no one else would, or perhaps could.

The notion Nuttall assaulted defendant by pushing him out of the restaurant is absurd. That measured response was in many ways a perfect example of reasonable force used for defensive purposes. Moments before, defendant's rage had escalated to a pitch that reduced the teenage restaurant employees to ineffectual panic. By all accounts he was acting like a madman wielding a baton-like metal cane, a cane he implied would be used as a

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[4] *E.g.*, 21 No. 6 OSHA Guide for Health Care Facilities Newsl. 6 ("in study of 51 active shooter incidents, the potential victims stopped the attacker themselves 17 times."); David B. Kopel, Pretend "Gun-Free" School Zones: A Deadly Legal Fiction, 42 Conn. L. Rev. 515, 544 (2009).

weapon as he menaced those around him in a confined space where they had gone for the peaceful purpose of a meal. He was circling and growling and started staring "strongly" at Nuttall, who reacted with just enough force to eliminate the peril by removing defendant from that space unharmed. The defensive quality of the act was emphasized by Nuttall's return to his chair once the immediate danger of defendant's presence had passed. All of which makes defendant a first aggressor who could not claim self-defense.

b. Self-defense instructions were rightly withheld as defendant reinitiated the conflict with Nuttall and retaliated by gratuitously striking him in the face.

Self-defense is designed to protect people, not pride. The defense has never covered retaliation or revenge. ***Janes***, 121 Wn.2d at 240; ***State v. McGonigle***, 14 Wash. 594, 600, 45 P. 20 (1896). It rests:

> on the natural right every[one] has to protect [one's] life against [] assault upon it by another. If [] secure from danger by [] removal from a threatened assault, [one] returns to meet [one's] adversary, and renews the combat, it cannot be pretended [one] acts in defense[.] [One] assumes [] a new character. [One] becomes a party voluntarily entering into [] unlawful conflict, and is responsible for all the consequences following [that] new position.

McGonigle, 14 Wash. at 600; ***State v. Bolar***, 118 Wn.App. 490, 494-97, 78 P.3d 1012 (2003). Ability to assert self-defense ends when the initial victim or aggressor withdraws long enough to terminate the affray. ***State v. Brown***, 3 Wn.App. 401, 403-04, 476 P.2d 124 (1970).

Whatever right defendant had to stand his ground in the restaurant, he had no right to reclaim it once he had been removed and his purported assailant exited the affray by retreating to a chair. For outside in the parking lot, defendant was safe from any threat posed by Nuttall. If defendant was aggrieved by a perceived assault, he should have called police. Responding officers could have helped him investigate the conversion of what appears to have been an imaginary bag. Instead, he readied his weapon and returned to the restaurant with Nuttall in his sights. They converged on opposite sides of an exterior door. A door Nuttall defensively tried to close as defendant aggressively strained to force his way in. It was during this standoff that defendant struck Nuttall in the face while standing safely behind the door. That strike was unequivocally an unwarranted retaliatory attack.

The manner in which that revenge was exacted tracks a common pattern. ***McGonigle***, 14 Wash at 600 (retreated, armed, returned); ***Brown***, 3 Wn.App. at 403-04; ***Colondro v. State***, 188 Ind. 533, 125 N.E. 27, 28 (1919) ("out of anger and in a spirit of revenge, [Colondro] came back and struck the fatal blow[.]"); ***State v. Davis***, 175 N.C. 723, 95 S.E. 48, 50 (1918):

> [The] defendant [] got his pistol and then returned to the field of combat, he assumed the character of an aggressor[.] He could easily have avoided another conflict, and, instead of acting in self-defense, [] his motive was one of revenge, or satisfaction, for the supposed wrong inflicted upon him[.]

Id.; ***People v. Woods***, 81 Ill.2d 537, 543, 410 N.E.2d 866 (1980).

c. Withholding self-defense instructions was harmless, if error, as defendant used more force than necessary even if one assumes he protected himself by blasting Nuttall in the face.

Failure to instruct on defense of self or property is not automatically constitutional error, nor is it presumptively prejudicial. ***State v. O'Hara***, 167 Wn.2d 91, 102-03, 217 P.3d 756 (2009). Even where a presumption of prejudice lies, the error may prove harmless if the verdict is supported by overwhelming evidence. *Id.*; ***State v. Brown***, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); ***Neder v. United States***, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999); ***State v. Robinson***, 38 Wn.App. 871, 876, 691 P.2d 213 (1984). Minimally supported self-defense claims should fail where defendants are proven to have used excessive force against their assailants. *See* ***State v. Ferguson***, 131 Wn.App. 855, 861, 129 P.3d 856 (2006) ("it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm.").

It is hard to imagine being present inside the Jack in the Box where defendant was violently running amok with his cane and not experiencing a profound sense of relief at the sight of him being ejected. A feeling likely rivaled by his anxiety-inducing return. Whatever one thinks of Nuttall's response—brave or foolish, defensive or offensive—he posed no threat to defendant by bracing the door between them in an effort to keep it closed.

A self-defense verdict would have required the force defendant used to be necessary, *i.e.*, reasonable in degree and warranted by lack of alternatives. ***Werner***, 170 Wn.2d at 337; CP 102. But defendant's extremely violent act of swinging a metal cane down upon Nuttall's nose was excessive by any measure. Rational jurors could not have excused that act as self-defense, for it was overwhelmingly proved to be an overreaction with all the trappings of revenge. However one looks at it, defendant's well-earned conviction for second degree assault should be affirmed.[5]

2. DEFENDANT RAISES AN UNPRESERVED AND MERITLESS CLAIM OFFICER MOSES OPINED ABOUT DEFENDANT'S GUILT BY USING THE WORD "WEAPON" WHILE EXPLAINING THAT HE DIRECTED DEFENDANT TO "DROP THE WEAPON" WHEN DEFENDANT APPROACHED HIM ON THE STREET WITH A METAL CANE REPORTEDLY USED TO ASSAULT SOMEONE MOMENTS BEFORE AT A RESTAURANT.

Trial courts have wide discretion to determine the admissibility of evidence. ***State v. Demery***, 144 Wn.2d 753, 758, 30 P.2d 1278 (2001) (citing ***State v. Rivers***, 129 Wn.2d 697, 709-710, 921 P.2d (1996)). So a

[5] Assignment of Error No. 2 claims the trial court erred in withholding several specific self-defense instructions, but they are not specifically addressed in the body of defendant's brief. It is assumed the assignment of error identifies the self-defense instructions attending the self-defense issue raised in Assignment of Error No.1. To the extent No. 2 is intended to present a standalone claim, it should be deemed waived by defendant's failure to include supporting argument or authority. ***Riley v. Iron Gate Self Storage***, 198 Wn.App. 692, 713, 395 P.3d 1059 (2017) (citing RAP 10.3 (a)(4) and (6)). The instructions are also improperly lumped together in one assignment of error, which is alone sufficient to reject the claimed error. ***Arnold v. Laird***, 94 Wn.2d 867, 874, 621 P.2d 138 (1980).

decision to permit testimony regarding a material fact that is *res gestae* to an offense on trial will not be reversed absent an abuse of discretion. *Id.*; ***State v. Filitaula***, 184 Wn.App.819, 825, 339 P.3d 221 (2014). It is reasonable for courts to permit police to testify about relevant facts based on personal knowledge as well as opinions and inferences based upon their own sensory perception of events surrounding a crime. *See* ***State v. Blake***, 172 Wn.App. 515, 523-24, 298 P.3d 769 (2012) (citing ER 701); ***City of Seattle v. Heatley***, 70 Wn.App. 573, 578, 854 P.2d 658 (1993); ER 401-403. Although witnesses are not permitted to express personal beliefs about a defendant's guilt, they are not precluded from giving testimony merely because it covers an issue to be decided by the jury. ***State v. Montgomery***, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

Defendant made the following *motion in limine* regarding Officer Moses' description of the metal cane defendant used in the assault:

> [Moses] refers to [] the walking stick/cane in this case in his report as a deadly weapon. He says in his report, "I asked Mr. Cooper to drop the deadly weapon." I would ask that he not be allowed to testify that as is, in fact, a question of fact for the jury, whether or not this walking stick was in this case used in a manner that made it a deadly weapon, since it's not a per se deadly weapon.

2RP 101. At no time did defendant seek to preclude Moses from recounting his use of the word "weapon" while testifying that he told defendant to "drop the weapon" when defendant approached with the cane. Nor was it claimed

that referring to the cane as "a weapon" improperly expressed an opinion about defendant's guilt. The court responded by ruling:

> I would agree [] the description of that [cane] as a deadly weapon would be inappropriate per se, unless there was some issue about how the weapon was used. But ultimately the instruction tells the jury what they have to find in order to conclude the deadly weapon.

2RP 100. Moses complied. 2RP 101-02, 137-38, 141-42. He did refer to it as a "weapon" without objection while describing what he said about the cane. 2RP 137 ("I … ordered him to drop the weapon."). The challenged usage was adduced during later questioning:

> [**STATE**] Did he comply with your other orders to drop the weapon?
>
> [**MOSES**] He complied with my order to drop the weapon, the stick that he was carrying.
>
> [**STATE**] I understand that you pulled your Taser out, and at that point he dropped the weapon. Did you order him to drop the weapon prior to that?

2RP 140. Defendant engaged in a colloquy with the court:

> [**DEFENSE**] Your Honor, I'm going to object, and I don't know if you want to address this as a sidebar or?
>
> [**COURT**] I'm [] not sure what the [] question is. So why don't you reask your question.
>
> [**DEFENSE**] I'm actually objecting to the use of term right now that was subject to a motion.
>
> [**COURT**] Overruled.

2RP 140-41. The State's examination continued:

[**STATE**] Officer, did you – well, do you recall what words you used in attempting to get the defendant to drop the stick?

[**MOSES**] I said to him, "Drop the weapon."

2RP 141. This testimony clarified whether defendant dropped the cane in response to Moses' command or Moses' use of the Taser, which was relevant *res gestae* and proof of defendant's mental state. 2RP 141-42.

The jurors were correctly instructed it was their "duty to accept the law from [the] instructions[.] CP 119 (No.1). They were also instructed:

> Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 142 (No.22). Such harm includes "fracture of any bodily part." CP 141 (No.21). Jurors received an additional instruction on what needed to be proved for them to find in favor of the deadly weapon enhancement. CP 151 (No.30). Despite the new claim Moses improperly used the word "weapon," the jurors left the deadly weapon verdict blank. CP 156-58.

a. Defendant is improperly attempting to raise an unpreserved claim of evidentiary error.

Error may only be assigned based on the ground preserved at trial. ***State v. Kirkman***, 159 Wn.2d. 918, 926, 155 P.3d 125 (2007) (citing ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)). This rule conserves scarce resources by ensuring trial courts are given an opportunity to prevent

or cure error, and thereby avoid needless appeals. *Id.*; ***State v. Boast***, 87 Wn.2d 447, 451, 533 P.2d 1322 (1976)); ER 103; RAP 2.5.

At trial, defendant moved *in limine* to preclude Officer Moses from referring to the cane as a "deadly weapon" since that is a statutory term to be defined by a jury instruction. *That motion* was granted. Moses complied, for he did not say "deadly" weapon while testify. It was never argued Moses could not testify about directing defendant to drop the "weapon."

The appeal tries to avoid the resulting procedural bar by comparing Moses' recitation of a command he gave defendant to an explicit or almost explicit statement about defendant's guilt or credibility. That argument is flawed. No element could have been satisfied by proof he had a "weapon." Moses' use of the word "weapon" could not communicate anything about defendant's credibility. Moses' challenged direction was relevant *res gestae*. Making its admissibility a nonconstitutional evidentiary issue waived if not raised at trial. ER 103, ER 401-03, 704. Review should not be granted.

b. Officer Moses did not express any opinion by directing defendant to "drop the weapon."

Defendant was charged with second degree assault against Nuttall, third degree assault against Moses, malicious mischief and obstruction. *Res gestae* evidence was admissible to prove those charges subject to ER 403 as it was necessary for a complete understanding of the case. *See* ***Filitaula***,

184 Wn.App. at 825. The State is not required to present a fragmented version of events through the omission of details that provide relevant context. *See* ***State v. Lillard***, 122 Wn.App. 422, 431, 93 P.3d 969 (2004). Such evidence is relevant if it tends to make any fact of consequence more or less probable. ER 401. Relevant evidence is typically admissible unless it is substantially more prejudicial than probative. ER 402-04.

Defendant erroneously claims Officer Moses improperly expressed an opinion about defendant's guilt through testimony that reiterated Moses' act of directing defendant to "drop the weapon," referring to the cane. The statutorily undefined word "weapon" cannot bear the statutory definition of "deadly weapon" or second degree assault. "Weapon" retains its common meaning, which is:

> "An instrument of offensive or defensive combat, or anything used, in destroying, defeating or injuring an enemy[,]" *i.e.*, "[s]omething to fight with."

State v. Ross, 20 Wn.App. 448, 453, 580 P.2d 1110 (1978). "Deadly weapon" is statutorily defined as a class of dangerous objects that does not include collapsible walking canes. RCW 9.95.040(2). "Deadly weapon" is further defined in terms of an object used in a lethal way. RCW 9A.04.110 (6). These are essential elements unqualified use of the word "weapon" fails to capture. It is also impossible for it to capture the additional *mens rea* and *actus reus* elements of second degree assault. RCW 9A.36.021. Proof

defendant possessed a weapon could not support conviction for a "deadly weapon" enhancement, much less second degree assault.

Officer Moses' *perception* defendant approached with a "weapon" was circumstantial evidence supporting the apprehension element of third degree assault. ***State v. Miller,*** 71 Wn.2d 143, 146, 426 P.2d 986 (1967) ("fact an officer may have courage and skill to disarm a person does not mean that he [or she] is devoid of apprehension[.]"); ***State v. Calvin***, 176 Wn.App. 1, 316 P.3d 496, 501 (2013) (*remanded on other grounds*, *i.e.* LFOs) 183 Wn.2d 1013, 353 P.3d 640 (2015); 9A.36.031. Defendant's reaction was likewise circumstantial evidence of his assaultive intent.

Intent can, often must, be inferred from conduct undertaken after an actor is made aware of how his or her behavior is perceived. *See* ***State v. Varga***, 151 Wn.2d 179, 200, 86 P.3d 179 (2004). Refusal to drop an object identified by another as a weapon could support an inference of an intent to induce fear or remain ready for attack. Just as ready release might reveal intent to put another at ease. The error in defendant's reasoning most often appears in the ER 704 cases. That rule clarifies "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Witnesses should use words intelligible to all. Incorporation of words into criminal statutes does not remove them from the lexicon available to

witnesses. Trial would be a poor instrument for truth finding if jurors instructed to weigh credibility by assessing the manner of testifying witnesses were presented witnesses fumbling for odd synonyms to convey concepts most naturally described by words rationally selected by legislators tasked with drafting statutes everyone can understand. Rules like ER 704 avoid that absurdity. *E.g.*, ***Heatley***, 70 Wn.App. at 579 (officer can testify a defendant appeared "intoxicated and impaired" even though DUI requires jurors to decide if a driver was impaired by intoxication).

c. Any conceivable error in Moses' use of "weapon" was harmless, if error.

Nonconstitutional evidentiary error is harmless unless it results in outcome determinative prejudice to the accused. ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence that is of minor significance cannot meet the standard. *Id.* Constitutional error cannot support overturning convictions overwhelmingly supported by untainted evidence. ***State v. Guloy***, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Defendant wrongly recasts nonconstitutional error as constitutional error to avoid a procedural bar. It is incorrect to analyze the mislabeled evidentiary issue under the constitutional harmless error test, yet the result would be the same. Defendant's convictions were overwhelmingly proved by uncontroverted evidence of the unprovoked rampage he forced everyone

who had the misfortune of encountering him that night to endure. No part of Moses' use of the word "weapon" could alter a rational appreciation for how defendant reduced Nuttall's nose to fragmented bone and smashed a glass door with a cane before assaulting a police officer. Any confusion he thinks Moses' use of "weapon" injected into the proceeding is precisely the type of problem capable of being remedied by a presumptively followed, but unrequested, limiting instruction. ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). And the reality defendant's jurors withheld a decision on the deadly weapon enhancement despite Moses' testimony refutes the very prejudice defendant claims. The challenged use was also cumulative as Moses referred to the cane as a "weapon" without objection prior to the usage challenged on appeal. 2RP 137.

3. DEFENDANT WRONGLY CLAIMS TRIAL COURTS COMMIT ***BLAZINA*** ERRORS BY ADOPTING PREPRINTED FINDINGS AFTER INQUIRING INTO ABILITY TO PAY ON THE RECORD AND HE INCORRECTLY MAINTAINS THE COURT FAILED TO WAIVE MANDATORY LFOs BASED ON MENTAL HEALTH ISSUES HE CLAIMED WOULD NOT PREVENT HIM FROM ATTAINING A BACHELOR'S DEGREE.

Criminal defendants are not entitled to automatic review of LFOs that were not challenged at trial. ***Blazina,*** 182 Wn.2d at 832. Review may nevertheless be granted, and was by ***Blazina*** to address what it perceived to

be systemic problems cured by ***Blazina***. *Id.* at 834-39. Reliance on ***Blazina*** is misplaced when a sentencing court only imposes mandatory LFOs. ***State v. Stoddard***, 192 Wn.App. 222, 223, 366 P.3d 474 (2016). There is some relief from them if:

> [T]he defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as a basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777.

There is no ***Blazina*** problem in this case as the trial court refrained from imposing discretionary LFOs. 10RP 504. ***Blazina*** requires courts to make an individualized inquiry into a defendant's ability to pay them. *Id.* at 837. That occurred. Nothing in the ***Blazina*** decision dictates the *form* a court's LFO findings must take, so there is no merit to the unpreserved challenge to the form of the ruling adopted by the court in this case.

Defendant also failed to preserve a RCW 9.94A.777 challenge to his LFOs. His allocution refuted the notion his disabilities prevented him from participating in gainful employment as RCW 9.94A.777 requires before mandatory LFOs can be waived. He believed his disabilities would not stop him from "getting [his] associate's and bachelor's degree or other further attainments." 10RP 500-01. And even if there was support for a RCW

9.94A.777 waiver, it would not extend to restitution or the victim penalty assessment. *Id.* This unpreserved and seemingly meritless challenge should fail.

D. CONCLUSION.

Defendant was not entitled to self-defense because he was a first aggressor who provoked the conflict he later reinitiated before breaking the victim's nose in a retaliatory act of excessive force. There is no merit to his unpreserved claim of evidentiary error, for Officer Moses did not express any opinion, much less one about defendant's guilt, by testifying to directing defendant to "drop the weapon" he was holding at the outset of an encounter relevant to his charges. There is also no merit to his unpreserved challenge to mandatory LFOs.

RESPECTFULLY SUBMITTED: September 20, 2017.

MARK LINDQUIST
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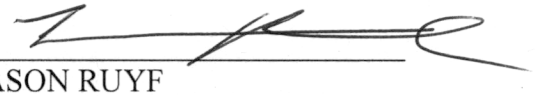

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.20.17 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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